

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 19, 2004

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carpenters Local 1506
(Brinker International Payroll Co.)
Case 21-CC-3335

560-2575-6746
560-2575-6767-2500
560-7540-0100
560-7540-8060-6717

This case was submitted to Advice as to whether the Union violated Section 8(b)(4)(ii)(B) when its agents posted a banner near two locations of a neutral employer, and at one of these locations an agent held handbills. We conclude that absent withdrawal, the Region should dismiss the instant charge because, under the totality of the circumstances, the Union's banner displays lacked a sufficient degree of confrontation with customers to be coercive.

FACTS

The Bergman Companies is the general contractor at the construction site of a new Chili's restaurant in San Diego. Bergman subcontracted drywall and metal studs work at this site to E.F. Brady Company/San Diego (Employer), which began work around the middle of September 2003. During the Employer's first few days at the site, Carpenters Local 1506 (Union) picketed with signs indicating that the Union had a labor dispute with the Employer.

On or around October 1, an Employer representative observed three individuals, who were Union agents but were not identifiable as such, outside an existing Chili's restaurant at 4252 Camino del Rio North (hereinafter Camino), which is located at the intersection of Rio Vista North and Mission Gorge Road in San Diego. They were stationed around 20 yards (60 feet) from the restaurant's main entrance and around 5 yards (15 feet) from one of the entrances to the parking lot adjacent to the restaurant. According to the Region, patrons likely access the parking lot through this entrance, but may also enter the lot through other entrances to the premises, which the restaurant shares with a multi-establishment shopping area. Two of the agents held an approximately 15-foot by 4-foot

banner stating "Don't Eat at Chili's" in large red letters. A third agent sat with handbills on the ground beside her. All three were stationary and did not walk with the banner or handbills. The Employer was engaged in no construction activity at or near Camino, which had been in operation for several years.

The Employer representative approached the Union agents and requested a handbill. The handbill, entitled "Shame on Chili's...", merely stated that the Union has a dispute with the Employer, a subcontractor of Bergman. Other than requesting the handbill, the Employer representative did not speak with the Union agents, except to ask whether they were hot and needed water; they responded that they had water. Several cars and no pedestrians passed the agents; there is no evidence that anyone other than the Employer representative received a handbill. The bannering at Camino ended around October 3.

On or around October 15, the Employer representative observed three individuals holding the same banner near another existing Chili's restaurant ("Scripps"), located at the intersection of Scripps Poway Parkway and Scripps Highland Drive in San Diego. As at Camino, these individuals were Union agents, but were not identifiable as such. The agents held the banner in front of a ground-level billboard-type sign bearing the logos and names of Chili's and a hotel. The banner was around 150 yards (450 feet) from the entrance to the restaurant. Patrons driving to the restaurant must pass the intersection where the banner was located. There is no evidence that the individuals holding the banner had handbills or that the Union is still displaying the banner at Scripps. There was no construction activity by the Employer at or near Scripps.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the charge allegation that the Union violated Section 8(b)(4)(ii)(B) when its agents displayed a banner at two neutral Employer locations because the totality of the circumstances shows that their conduct was not tantamount to picketing or otherwise unlawfully confrontational with customers.

Traditional union picketing usually involves individuals patrolling while carrying placards attached to sticks.¹ Such activity involves a "mixture of conduct and

¹ See generally Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (citations omitted).

communication" and the response it seeks to elicit from the public, unlike handbilling, does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] often provides the most persuasive deterrent to third persons about to enter a business establishment."² Thus, unlike handbilling, which is a non-coercive manner of persuading others to take action against a secondary employer, picketing is subject to regulation because the "conduct element" elicits a response apart from any message being presented.³

The presence of traditional picket signs and/or patrolling by union agents is not a prerequisite for finding that a union's conduct is coercive as the equivalent of traditional picketing.⁴ "One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."⁵ Along the same lines,

[t]he important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.⁶

In determining whether a union is engaged in activity that is the equivalent of either lawful handbilling or unlawful confrontational activity, the Board looks to whether, under the totality of the circumstances, conduct

² Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988) (citations omitted).

³ Id.

⁴ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), *enfd.* 402 F.2d 452 (10th Cir. 1968).

⁵ Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965) (citation omitted).

⁶ Lumber and Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965); *see also* United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), *enfd.* 76 LRRM 2828 (7th Cir. 1971).

rather than speech is being used to elicit the desired sympathetic response. Pursuant to this approach, factors that may support a finding of coercive confrontational conduct include: mass activity involving crowds that far exceed the number of people necessary for solely free speech activity;⁷ patrolling with signs, including a truck with mounted signs;⁸ confronting customers and employees as they enter a neutral employer's facility;⁹ and a union's prior traditional picketing at the same facility.¹⁰ Depending on

⁷ See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (mass grouping violative of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Local 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)").

⁸ See Painters Local 9 (We're Associates), 329 NLRB 140, 142 (1999) (sign mounted on automobile equated with picketing); Electrical Workers IBEW Local 98 (Telephone Man), 327 NLRB 593, 600 (1999) (union violated 8(b)(4)(i) and (ii)(B) by patrolling from primary gate to secondary gate in an attempt to pressure secondary employers at the worksite).

⁹ See, e.g., We're Associates, above, 329 NLRB at 142 (union's conduct of milling about and confronting neutral employees' vehicles at entrance to facility was picketing, not a "demonstration," and therefore unlawful under Section 8(b)(4)(i)(B)); William J. Burns Intl. Detective Agency, Inc., above, 136 NLRB at 437 (handbillers impeded customer access to neutral employer's premises in a manner that also included element of physical restraint). See also Construction & General Laborers Local Union 4 (Quality Restorations), Case 13-CC-2006, Advice Memorandum dated January 19, 1996 (purpose of individual dressed as a rat who patrolled in front of association was to confront customers or employees rather than to engage in protected free speech).

¹⁰ See General Service Employees Local 73 (Andy Frain), 239 NLRB 295, 306 (1978) (handbilling was more like picketing that violated 8(b)(4)(i) and (ii)(B) where union distributed handbills, displayed signs in parked cars, photographed neutrals, and previously picketed facility); Kansas Color Press, above, 169 NLRB at 283-84 (union's handbilling and display of large sign was picketing in violation of 8(b)(7)(B) where, among other things, union had displayed

all the circumstances, a banner that misleads individuals approaching a neutral employer's premises to believe that a union has a dispute with the secondary employer may also suggest confrontation.¹¹

Here, we conclude that under the totality of circumstances, the Union's displays of a banner near both the Camino and Scripps Chili's restaurants were not coercive because they lacked a sufficient degree of confrontation. First, the banner was neither knowingly false nor intentionally misleading because the phrase "Don't Eat at Chili's" does not indicate a labor dispute with Chili's or any other employer.¹² There is also no indication that the individuals holding the banner or handbills were identifiable as Union agents, so passersby would not be aware that the individuals were present in connection with a labor dispute. Second, the Union agents were stationary and did not approach customers or impede access to the restaurants. In fact, an agent at Camino sat on the ground without offering handbills even as several cars passed, and only distributed a handbill to one pedestrian, the Employer representative, upon request. Third, the location of the Union agents and banner does not support a finding of confrontation. The Union agents at Scripps held the banner far enough (450 feet) from the entrance to the restaurant that patrons would not feel coerced or confronted as they entered. Although the Camino banner was located closer to the restaurant and its apparent primary parking lot entrance, patrons may use several entrances to gain access to the lot, which also serves several other commercial establishments. Therefore, they would not necessarily drive by the banner to park at the restaurant. Last, there was no other activity pointing to confrontation at either location, such as Union agents milling around, or videotaping or photographing patrons.

the sign and engaged in five years of traditional picketing at the facility); Stoltze Land & Lumber Co., above, 156 NLRB at 393, 394 (violation of 8(b)(7)(B) where the same union agents who had engaged in traditional picketing at the facility for over a year were posted in front of employer's office and began to distribute handbills).

¹¹ See Carpenters Local 209 (Kings Hawaiian Restaurant & Bakery), Case 31-CC-2103, Significant Appeals Minute dated Sept. 25, 2002.

¹² See Southern California Conference of Carpenters (Eppink of California, Inc.), Case 21-CC-3310, Advice Memorandum dated April 18, 2003 (slogan "Shame on [neutral]" did not indicate a labor dispute). Here, the Employer concedes that the banner is not intentionally misleading.

In accordance with the above, the Region should dismiss, absent withdrawal, the Section 8(b)(4)(ii)(B) charge alleging that the Union unlawfully displayed banners at two Chili's restaurant locations.

B.J.K.